Petition

81-246

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In The

Supreme Court of the United States

October Term, 1981

No.

EUGENE B. KANIA,

Petitioner,

v.

THE UNITED STATES,

Respondent.

On Appeal from the United States
Court of Claims

PETITION FOR WRIT OF CERTIORARI – CONTRACT CLAIM

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QUESTIONS PRESENTED

1. Did the Court of Claims err in holding that it had no jurisdiction under Title 28 U.S.C. § 1491 to award petitioner damages for his claim against the Government?

2. Did the Court of Claims err in holding that petitioner's damages are not recoverable in the Court of Claims?

3. Did the Court of Claims err in holding that the doctrine of collateral estoppel is not applicable?

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No._____

EUGENE B. KANIA,

Petitioner,

-against

THE UNITED STATES,

Respondent.

PETITION FOR CERTIORARI - CONTRACT CLAIM

Petitioner prays that a Writ of Certiorari be issued to review the judgment of the Court of Claims entered in these proceedings on May 20, 1981.

OPINION BELOW

The Opinion of the Court of Claims has not yet been reported, but is set

forth in the Appendix, infra, at pp. 1a-10a.

JURISDICTION

The Opinion of the United States Court of Claims was entered on May 20, 1981. The jurisdiction of this Court is invoked under Title 28 U.S.C. § 1255(1).

STATUTORY PROVISION INVOLVED

The pertinent provision of the statute (Title 28 U.S.C. § 1491) involved is set forth in the Appendix, infra, at p. 11a.

STATEMENT OF THE CASE

Petitioner, Eugene Kania, is a former officer of Railway Express Agency, Inc. (REA), serving as Vice President of Finance from approximately December 1970 to December 1974. In or about 1974 the Interstate Commerce Commission ("ICC") began an investigation into the affairs

of REA. The investigation was later referred to the United States Attorney for the Southern District of New York (SDNY).

On or about October 25, 1977, the Assistant United States Attorney for the SDNY who was in charge of that investigation spoke with the petitioner; told petitioner that his assistance was valuable to the Government's investigation; that the Government was desirous of his continued assistance; and assured petitioner that he was not a target of the investigation. On the same day, pursuant to subpoena, petitioner testified before the grand jury concerning various matters at REA.

In January, 1978, the Assistant in charge of the REA investigation contacted petitioner again and requested his further assistance. At that time, petitioner was represented by counsel. Prior to

divulging any additional information, petitioner and respondent entered into an agreement (hereinafter referred to as the "contract"). The terms of the contract were that the United States Attorney's office would not prosecute petitioner in connection with any of his actions at REA in return for his good faith testimony before the grand jury. The contract terms were subsequently memorialized by the Assistant United States Attorney at the commencement of petitioner's grand jury appearance on March 8, 1978 (Appendix, infra, pp. 12a-13a).

Petitioner performed his obligations, pursuant to and in reliance on the terms of the contract, and testified before the grand jury. In so doing and in reliance on the contract, the petitioner waived the exercise of the substantial rights that he then had.

Respondent breached its contract

with the petitioner in that on or about March 8, 1979, Mr. Amorosa (the Assistant in charge of the investigation) asked the grand jury sitting in and for the SDNY to return an indictment against the petitioner. The grand jury returned an indictment which directly related to petitioner's alleged actions at REA.

Petitioner, through his present counsel, filed a motion to dismiss the indictment averring that its procurement by the respondent was a breach of the contract. Respondent opposed this motion and a hearing was held. Honorable Morris E. Lasker of the United States District Court for the Southern District of New York granted the motion to dismiss the indictment on May 2, 1979. In so ruling, Judge Lasker held that the agreement was that Mr. Kania would not be prosecuted if he testified truthfully to whatever he was asked to testify and

that in fact the petitioner had testified truthfully (Appendix, infra, pp. 14a-15a). There was no appeal from that decision.

The petitioner moved as expeditiously as possible for dismissal of the indictment. Since there was no assurance that the motion would be granted, petitioner was forced to proceed with pretrial discovery and trial preparation in anticipation of the trial by mid-May 1979. This major undertaking was the direct consequence of the respondent's breach of the contract in obtaining the illegal indictment and a consequence fully known to the respondent when it breached the contract. In obtaining the indictment, the respondent was fully aware that the subsequent proceedings would be governed by the provisions of the Speedy Trial Act (Title 18 U.S.C. § 3161, et seq.). The respondent was similarly aware of the magnitude of

pretrial discovery which encompassed myriad activities of many individuals and corporate entities taking place over a span of more than twelve years. The respondent produced tens of thousands of pages of documents for inspection and made no effort to segregate the documents or to identify which of the documents it intended to rely on at trial.

Petitioner brought suit in the Court below pursuant to 28 U.S.C. § 1491. Petitioner based his claim on the respondent's breach of the January 1978 express contract. The Court below denied petitioner's motion for summary judgment and granted respondent's cross-motion for summary judgment, holding that it had no jurisdiction under § 1491 of Title 28 of the United States Code (Tucker Act); and that petitioner's damages, which it characterized as "counsel fees," were

not recoverable in the Court of Claims.

EXISTENCE OF JURISDICTION BELOW

Petitioner brought suit in the Court of Claims pursuant to Title 28 U.S.C. § 1491 (Appendix, infra, p. 11a).

REASONS FOR GRANTING THE WRIT

The decision below should be reviewed because it establishes a precedent under which a citizen is denied the right to recover damages resulting from the Government's breach of a contract not to prosecute. The Court below improperly limited the scope of its jurisdiction. In denying petitioner his right of recovery and in limiting the scope of its jurisdiction, the Court below decided important questions of federal law which should be settled by this Court.

Petitioner's claim is founded upon a valid and enforceable contract between petitioner and respondent. Petitioner

was damaged as a result of a willful and deliberate breach of contract by the respondent and he seeks compensation for the wrong inflicted upon him. The respondent, for adequate consideration, contracted with the petitioner that it would not prosecute him; it breached the contract and the petitioner was damaged as a result of that breach.

The Court of Claims, under Title 18 U.S.C. § 1491 has jurisdiction to render judgment upon any claim against the United States founded upon " ... <u>any express or implied contract</u> with the United States ..." (emphasis added). The classes of contracts are not restricted by the Tucker Act and its jurisdiction clearly includes the contract involved in this case.

The Government with ever increasing frequency is entering into non-prosecution agreements and the questions presented by

this case are of great significance. The effect of the decision below makes this case a peculiarly appropriate one for the exercise of this Court's discretionary jurisdiction.

In this case the Court below has announced a far-reaching rule that would deny jurisdiction in the Court of Claims to every party to a Government non-prosecution contract. This rule is contrary to the language of the Tucker Act.

We submit that the rule announced in this case (1) destroys the integrity of the non-prosecution contract by permitting the Government to dishonor its promise of non-prosecution, and thereby force the other party to defend against an illegal indictment at his own expense; (2) robs the non-prosecution contract of its reason for being by inviting government breach; and (3) imposes an unwarranted burden upon the non-government

contracting party.

The Court below has proffered an invitation to this Court to grant this petition for writ of certiorari. After holding that it has no jurisdiction under the Tucker Act to award damages for petitioner's claim against respondent, the Court below held: "should this be in error, we must now add ..." (emphasis added) (Appendix, infra, p. 10a). It is readily apparent that the Court below is uncertain of its own decision, and review by this Court is necessary to correct a situation which, if left as is, will impair the rights of parties to non-prosecution contracts as well as destroy the integrity of such contracts.

ARGUMENT

Tucker Act Jurisdiction

The Court below misreads the Tucker Act when it interprets the Act to deny

jurisdiction for petititoner's claim against the respondent. The Tucker Act bestows jurisdiction on the Court of Claims for claims based upon the Constitution, a statute or regulation, or an express or implied contract. Petitioner's claim below was based only on an express contract. Thus, the reliance of the Court below on Eastport Steamship Corp. v. United States, 178 Ct. Cl. 599, 372 F.2d 1002 (1967) and Austin v. United States, 206 Ct. Cl. 719, cert. denied, 423 U.S. 911 (1975), is inapplicable since neither case involved a contract claim. Petitioner's claim is founded upon a valid and enforceable contract between peititioner and respondent. The contract is memorialized in the stenographic transcript of the grand jury minutes (Appendix, infra, pp. 12a-13a) and its terms are set forth in the written

decision of Judge Lasker (Appendix, infra, pp. 14a-15a).

The Court below recognized its jurisdiction based upon an express contract. It held, however, that this jurisdiction does not extend to every "agreement, understanding or compact" (Appendix, infra, p. 7a) and specifically found that the contract here in issue was an exception to the general rule. Nowhere did the Court explain or justify why it should carve out this exception from its general jurisdiction. The result has allowed the respondent to breach a contract with impunity and deny the petitioner the right to recover his damages. The decision below not only flies in the face of the provisions of the Tucker Act, it unfairly deprives the petitioner of his legal right to recover damages.

We note that the Court below has conceded "it possible to make a binding

contract subject to Tucker Act jurisdiction, creating a liability for a breach of a plea bargaining agreement or one to grant immunity for giving testimony, or to protect a witness" (Appendix, infra, p. 8a). The Court below, however, went on to say that "in such case, the court would look for specific authority in the AUSA to make an agreement obligating the United States to pay money, and spelling out how in such a case the liability of the United States is to be determined" (Appendix, infra, p. 8a). Yet, the respondent has never taken the position that the AUSA lacked the authority to make a contract obligating the United States to pay money. To the contrary, the respondent has conceded and indeed has vigorously asserted the existence of the contract between petitioner and respondent. By affidavit sworn to April 20, 1979 and submitted to Judge

Lasker, Dominic Amorosa, the AUSA representing the United States before Judge Lasker, stated:

> "He [petitioner] and the Government simply entered into a contract which barred his prosecution for all offenses he committed while at REA in return for ..." (emphasis added)

Furthermore, petitioner entered into the contract principally to avoid the substantial expense of the defense of a criminal prosecution. By entering into the contract with petitioner the respondent clearly recognized that the avoidance of this expense was one of the principal benefits of the bargain with petitioner. Once the contract was breached by the respondent, petitioner was forced to expend monies for the precise purpose the contract was designed to avoid and giving rise to the damages he now seeks. The respondent knew these damages would naturally flow from the breach of the contract.

There can be no dispute that respondent and petitioner did, in fact, enter into a contract. There was an offer by respondent that petitioner would not be prosecuted for his actions at REA in return for his good faith testimony in the grand jury. There was an acceptance by petitioner who agreed to testify. The terms of the contract were accepted by both parties. There was consideration in that respondent agreed to forego any prosecution and petitioner agreed not to exercise his constitutional rights when appearing as a witness in the grand jury. Each and every necessary element of a contract was established. Furthermore, and as will be developed later in this brief, the respondent is collaterally estopped from denying the existence of a valid and enforceable contract between petitioner and respondent.

The reliance of the Court below on Doe v. United States, Ct. Cl. No. 457-78 (order entered May 16, 1980); and Festa v. United States, Ct. Cl. No. 438-79c (order entered October 17, 1980) is also misplaced. In both Doe, supra, and Festa, supra, the plaintiffs sought damages based on an alleged contract arising from promises to provide plaintiffs with benefits pursuant to the Witness Protection Program under the Organized Crime Control Act of 1970, Pub. L. No. 91-452, Title U, §§ 501-504, 84 Stat. 933 (1970), and pursuant to 28 U.S.C. § 524 (1976).

Doe, supra, and Festa, supra, are clearly distinguishable from the instant case. The Court in Doe and Festa held that plaintiffs' claim was not under a contract but rather for violation of a federal statute or regulation and since the statute or regulation did not establish a right that plaintiffs be paid

anything without such a command there was no jurisdiction in the Court of Claims. The Court of Claims based its holding on the fact that payments under the witness protection program are nontaxable gratuities from the Government for persons in need, and that expenditures under the program do not arise out of contractual relationships but rather from the discretionary authority delegated to selected administrators by statute and regulation. By contrast, petitioner's claim is founded upon a valid and enforceable contract between petitioner and respondent.

In summary, the contract entered into between petitioner and respondent is plainly the kind of express contract falling within the jurisdiction of the Court of Claims under the Tucker Act. The Court below has misinterpreted the extent of its jurisdiction as it relates to contracts between the prosecutorial

arm of the Government and citizens. Where such contracts are breached by the Government the citizen should not be denied his right to redress and is entitled to nothing less than the rights afforded to the citizen who has been damaged as a result of the breach by the Government of any express contract.

Damages

A second issue addressed by the Court below was that of damages. The Court below held that in "the absence of specific statutory authority, expenses incurred in litigation, whether legal, accounting, secretarial, or other, are not awardable as such." (Appendix, infra, p. 9a) This holding as applied to the instant proceeding is erroneous and the cases relied on in support thereof are totally inapplicable. Petitioner does not seek the costs of

litigation, nor does he seek attorney's fees; rather the petitioner seeks damages arising from the Government's breach of the contract. In this instance the measure of damages is the attorney's fees and expenses that petitioner was forced to pay as a result of the indictment returned against him in breach of the contract.

In the cases relied upon by the Court below, the claim for attorney's fees was not based upon specific damages incurred as a result of a breach of a contract -- the avoidance of which was part of the bargain -- but rather as an additional cost sought by one of the parties to the litigation.

That attorney's fees are a proper measure of damages has been established by this Court in Vaughan v. Atkinson, 369 U.S. 527, 82 S. Ct. 997 (1962). In distinguishing claims for legal fees as

"costs" from a claim for legal fees as "damages" this Court stated at 369 U.S. 530:

> "As we stated in Sprague v. Ticonic Nat. Bank, 307 U.S. 161, 164, 59 S. Ct. 777, 779, 83 L.Ed. 1184, allowance of counsel fees and other expenses entailed by litigation, but not included in the ordinary taxable costs regulated by statute, is 'part of the historic equity jurisdiction of the federal courts.' We do not have here that case. Nor do we have the usual problem of what constitutes 'costs' in the conventional sense (citation omitted). Our question concerns damages." (Emphasis added)
>
> * * * *
>
> "In the instant case respondents were callous in their attitude, making no investigation of libellant's claim and by their silence neither admitting nor denying it. As a result of that recalcitrance, libellant was forced to hire a lawyer and go to court to get what was plainly owed him under laws that are centures old. The default was willful and persistent. It is difficult to imagine a clearer case of damages suffered for failure to pay maintenance than this one." (Emphasis added)

In allowing legal fees incurred as an item of damages, this Court has

recognized that such fees may properly constitute a measure of damages in the federal courts. In the present case the respondent's knowing and intentional breach of the contract forced petitioner to incur legal expenses, which were the direct result of the respondent's breach of the contract. These were the expenses, the avoidance of which were part of the bargain. It was surely contemplated by the parties that if the Government breached the contract the petitioner would be damaged by incurring legal fees.

The Court below incorrectly characterized petitioner's damages as "consequential damages." To the contrary, petitioner seeks the direct compensatory damages flowing from the Government's breach of contract. In obtaining the indictment the respondent necessarily knew that petitioner would be required to obtain legal counsel not only to seek

dismissal of the indictment but to prepare for trial in the event the indictment was not dismissed. The respondent also necessarily knew that, because of the provisions of the Speedy Trial Act, extraordinary legal services would be required in preparing for a complex trial contemporaenously with efforts made in connection with the motion to dismiss the indictment. This is not a situation, as the Court below erroneously found, in which a claimant seeks damages plus legal fees, rather it is one in which the claimant seeks the direct damages flowing from the breach -- the legal fees incurred.

Collateral Estoppel

The principle of collateral estoppel precludes the relitigation of issues already decided and binds the respondent, against whom the doctrine is being

invoked, to the determination of the issues made on May 2, 1979 by Judge Lasker. The parties to both actions are the same and the essence of collateral estoppel is that some question or fact in dispute has been judicially and finally determined by a court of competent jurisdiction between the same parties or their privies.

Stated succinctly by this Court, collateral estoppel " ... means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." Ashe v. Swenson, 397 U.S. 436, 442, 90 S.Ct. 1189, 1194 (1970). This principle is equally applicable to civil and criminal law. Ashe, supra, at 397 U.S. 442. In civil actions, such preclusion applies to an issue that has been determined adversely to a party in a prior federal criminal proceeding.

Emich Motors Corp. v. General Motors Corp., 340 U.S. 558, 568, 71 S.Ct. 408, 414 (1951).

The collateral estoppel doctrine is relevant to petitioner's claim since the issues decided by Judge Lasker were determinative of the matters at issue below and binding on the parties. There remained no genuine issue as to any material fact in that all issues were determined by Judge Lasker and were binding on the respondent below.

Judge Lasker made the following findings of fact that were essential to his judgment and which are binding on the respondent since their relitigation is precluded by the doctrine of collateral estoppel:

(1) That there was a contract between the petitioner and the respondent;

(2) The contract was that the United States Attorney's office would not

prosecute the petitioner in connection with any of his actions at REA in return for petitioner's good faith testimony;

(3) The petitioner fulfilled his obligations pursuant to the terms of the contract and was not in violation of the agreement; and

(4) The respondent breached the contract by obtaining an illegal indictment against the petitioner herein.

This Court in Southern Pac. R. Co. v. United States, 168 U.S. 1, 48-49, 18 S.Ct. 18, 27 (1897) stated the collateral estoppel doctrine as follows:

> "The general principal announced in numerous cases is that a right, question, or fact distinctly put in issue, and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and, even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long

> as the judgment in the first suit remains unmodified. This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for the aid of judicial tribunals would not be invoked for the vindication of rights of person and property if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue, and actually determined by them."

In substance, the issue of whether the respondent breached the contract with the petitioner has been decided in favor of petitioner and that determination is binding on the parties herein.

The Court below in an effort to refute the doctrine of collateral estoppel reasoned that if in a future case similar to petitioner's, a district judge knew his findings on the motion to dismiss would by collateral estoppel create a liability for money damages in the Court

of Claims, it might influence his willingness to grant the relief Judge Lakser granted. A District Court Judge has his particular jurisdiction and responsibilities; and a Court of Claims judge has separate jurisdiction and different concerns. Each is fully aware of his own responsibility. We can perceive of no situation in which a federal judge would hesitate to dismiss an illegal or improper indictment merely because the Government might subsequently be required to pay damages arising from the breach of a contract. Just as an illegal or improper indictment must be dismissed, the victim of the Government's breach of contract is entitled to redress and recovery of damages suffered. Here, Judge Lasker recognized his duty and performed it, the Court below did not.

CONCLUSION

Petitioner Kania prays that his petition for certiorari be granted to settle this important question of federal law which has not been, but should be, settled by this Court. For all of the reasons stated herein it is respectfully submitted that this petition for a writ of certiorari should be granted.

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A P P E N D I X

DECISION OF THE UNITED STATES COURT OF CLAIMS

[Decided May 20, 1981]

No. 6-80C

Eugene B. Kania

v.

The United States

In the United States Court of Claims

No. 6-80C

(Decided May 20, 1981)

EUGENE B. KANIA
v. THE UNITED STATES

Joseph J. Marcheso, attorney of record, for plaintiff.
Frank M. Rapoport, with whom was *Acting Assistant Attorney General Thomas S. Martin*, for defendant.

Before NICHOLS, KUNZIG and SMITH, *Judges*.

ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

NICHOLS, *Judge*, delivered the opinion of the court:

This case comes before the court on cross-motions for summary judgment filed by plaintiff and defendant. There is no issue of relevant fact. The claim is for expenses incurred in preparing the defense of a party indicted for a crime, under peculiar circumstances, but never tried. Plaintiff seeks recovery in the amount of $42,000 plus interest and costs.

I

Plaintiff, Eugene Kania, is a former officer of the Railway Express Agency, Inc. (REA). He served as vice president of finance from approximately December 1970 to December 1974. REA was for many years engaged in commerce as a common carrier and conducted a ground and air express service within the United States. On or about February 18, 1975, REA filed a petition in the United States District Court for the Southern District of New York, pursuant to Chapter XI of the Bankruptcy Act. On or about November 6, 1975, REA was adjudicated a bankrupt and a trustee in bankruptcy was appointed.

In or about 1974 the Interstate Commerce Commission (ICC) began an investigation into the affairs of REA. The investigation was subsequently referred to the United States Attorney for the Southern District of New York who then assumed control of the investigation in collaboration with the ICC. The investigation dealt with complex and myriad activities of REA spanning a period in excess of 12 years and encompassed, with other things, allegations of political and financial corruption.

In July 1974 an investigator of the ICC sought out the plaintiff and asked his assistance in unraveling the affairs of REA. Plaintiff was assured by the investigator that he was not a target of the investigation. Plaintiff cooperated with the investigator, was interviewed without an attorney, and was thereafter subpoenaed to appear before a grand jury empaneled in the Southern District of New York.

On or about October 25, 1977, an Assistant United States Attorney (AUSA) for the Southern District of New York, Dominic Amorosa, spoke with plaintiff and told him his assistance was valuable to the government's investigation, the government was desirous of his continued assistance, and, under no circumstances was he a target of the investigation. On the same day, pursuant to subpoena, plaintiff testified before the grand jury concerning various matters at REA.

In January 1978 AUSA Amorosa solicited plaintiff's further cooperation. Plaintiff was then represented by counsel. Prior to divulging any information, plaintiff and AUSA Amorosa entered into an agreement with regard to plaintiff's appearance before the grand jury. It concerned the question

of whether plaintiff would or would not be prosecuted. That agreement was never reduced to writing.

A dispute later arose over the terms of the agreement. It was plaintiff's understanding that if he cooperated with the government by testifying truthfully before the grand jury he would not be prosecuted for any of his actions which occurred while he was employed at REA. Plaintiff described the agreement as affording him transactional immunity.

It was the government's position that plaintiff's obligation encompassed not only the giving of truthful testimony before the grand jury, but also a duty to answer fully all government inquiries outside the courtroom and to reveal all of his and others' wrongful conduct at REA. The government denied that plaintiff had been given full transactional immunity. Instead, the government explained that plaintiff had been afforded only informal, conditional immunity.

Plaintiff was brought before the grand jury in March 1978 to testify about the bribery schemes. On November 2, 1978, Amorosa notified Mr. Kania that he was a target of a grand jury investigation. After Mr. Kania declined to appear voluntarily and denied all wrongdoing, the matter was brought before the grand jury which indicted him on March 8, 1979.

Shortly thereafter, Mr. Kania through his present counsel, filed a motion to dismiss the indictment averring that the government had violated its agreement not to prosecute him if he testified truthfully before the grand jury. The government opposed this motion and a hearing was held. Judge Morris E. Lasker, of the United States District Court for the Southern District of New York, granted the motion to dismiss the indictment on May 2, 1979. In so ruling, Judge Lasker held that the agreement was that Mr. Kania would not be prosecuted if he testified truthfully to whatever he was asked to testify, and that there was no evidence that Mr. Kania violated that agreement. There was no appeal of that decision.

II

Plaintiff says that his agreement with the government was a contract. The terms of that contract were that the United States Attorney's office would not prosecute plaintiff in

connection with any of his actions at REA in return for his good faith testimony before the grand jury. According to plaintiff, the contract terms were memorialized by AUSA Amorosa at the commencement of plaintiff's grand jury appearance on March 8, 1978. At that time and after plaintiff had been duly sworn in, he was asked by Mr. Amorosa, "Mr. Kania, have you been told by a representative of the government that you will not be prosecuted in connection with this matter in return for your good-faith testimony?" Plaintiff then replied, "Yes, I have."

Continuing along this line of argument, plaintiff says that by testifying before the grand jury he performed his obligations under the contract. The government was benefitted by plaintiff's performance, yet breached the contract when AUSA Amorosa asked the grand jury for the Southern District of New York to return an indictment against the plaintiff. According to plaintiff, this breach damaged him because he was forced to proceed with time consuming and expensive pretrial discovery and trial preparation without ascertaining the scope of his immunity, because of the provisions of the Speedy Trial Act, 18 U.S.C. § 3161 which require trial to commence within 60 days of the date of arraignment. Although he moved expeditiously to dismiss the indictment, there was no assurance that the motion would be granted. Therefore, plaintiff claims that he was damaged in that he incurred various costs and expenses including but not limited to legal fees incurred in defending against the indictment.

The government counters by asserting that plaintiff's claim is based in tort, not contract, and is a claim for malicious prosecution. Or in the alternative it is a claim for attorney's fees incurred by plaintiff while defending a criminal prosecution. Either way, plaintiff would not be entitled to recovery if defendant is correct.

III

We cannot agree with plaintiff's argument that Judge Lasker found that there was a contract between plaintiff and the United States and that therefore the doctrine of collateral estoppel precludes relitigation of that question. Judge

Lasker did find that there was an agreement between plaintiff and defendant. His exact language was—

> In January of 1978, the Government indicated to Mr. Kania that they wanted further testimony from him. * * * [A]nd an oral agreement was entered into between the Government and the defendant with regard to his appearance before the grand jury and the question of whether he would or would not be prosecuted.

Throughout his opinion Judge Lasker referred to the arrangement as an agreement, not a contract. But, of course the fact that the catch-word, or exact legal terminology of "contract" was or was not used is not dispositive. Our decision here does not turn on whether Judge Lasker or either of the parties might have earlier described the arrangement as a "contract."

Indeed, both parties have changed their respective positions on the question of whether or not their arrangement was or was not a contract. The government in its affidavit sworn to on April 20, 1979, by AUSA Amorosa states, "[h]e [Kania] and the Government simply entered into a contract which barred his prosecution for all offenses he committed while at REA in return for * * *." And Judge Lasker found, "[i]t is the Government's position that it had a contract with Mr. Kania to cooperate in good faith." The government's current position is that there was no contract and that plaintiff invokes contract theory to mask what is in reality a claim alleging tortious injury and violations of constitutional due process.

And plaintiff's earlier position was also quite different from his present position. In response to the government's prior contract argument, plaintiff asserted, "[i]n paragraphs 8 and 9 of his affidavit, Mr. Amorosa attempts to reduce the issue now before the Court to a matter of contract law. * * * The issue before this Court [U.S. District Court SDNY] is not one which can be decided on the basis of a simplistic consideration of contract law. Rather the issue is one of fairness which rises to constitutional dimensions." Now both parties chastise one another for their prior statements and positions, and subsequent turnabouts.

The reason that plaintiff's contract argument must fail here is because this court has no jurisdiction to award damages for his claim against the government. Section 1491 of Title 28 of the United States Code (Tucker Act) grants the court jurisdiction to redress claims against the U.S. Government "founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." Plaintiff cites to no applicable section of the Constitution or to any statute or regulation entitling him to recover damages against the government in this court under the facts stated. Therefore his claim must fail. *Eastport Steamship Corp.* v. *United States*, 178, Ct.Cl. 599, 372 F.2d 1002 (1967); *Austin* v. *United States*, 206 Ct.Cl. 719, *cert. denied*, 423 U.S. 911 (1975); *Doe* v. *United States*, Ct. Cl. No. 457–78 (order entered May 16, 1980); and *Festa* v. *United States*, Ct. Cl. No. 438–79C (order entered October 17, 1980). (In both the *Doe* and *Festa* cases cited above plaintiffs sought damages for breach of contract under the Witness Protection Program of the Department of Justice under the Organized Crime Control Act of 1970, Pub.L. No. 91–452, title V, §§ 501, 504, 84 Stat. 933 (1970).)

The contract liability which is enforceable under the Tucker Act consent to suit does not extend to every agreement, understanding, or compact which can semantically be stated in terms of offer and acceptance or meeting of minds. The Congress undoubtedly had in mind as the principal class of contract case in which it consented to be sued, the instances where the sovereign steps off the throne and engages in purchase and sale of goods, lands, and services, transactions such as private parties, individuals or corporations also engage in among themselves. If the government insists on making itself the sole judge of law and fact in all disputes between its contractors and itself, the prices and terms it pays or receives will compare unfavorably with those that obtain in purely private transaction.

Thus it has long been held that the rights of civilian and military public employees against the government do not turn on contract doctrines but are matters of legal status

even where compacts are made. *Shaw* v. *United States*, Ct. Cl. No. 49–79 (slip opinion of January 28, 1981, at 11). Thus the consent to suit for back pay by employees when given, is not given by the consent in the Tucker Act to suits on contracts. A contract between government and one of its employees is possible, but it must be specifically spelled out as a contract. *United States* v. *Hopkins*, 427 U.S. 123 (1976). The contract must be made by a person having authority, *Walton* v. *United States*, 213 Ct.Cl. 755 (1977). Similarly, the government can be liable in Tucker Act suits brought to enforce grant contracts for disaster relief, but only to the extent it has expressly indicated its intent to be obligated to pay money. *State of Texas* v. *United States*, 210 Ct.Cl. 522, 529, 537 F.2d 466, 469–70 (1976). The claimant for money damages for breach of an express or implied in fact contract must show that the officer who supposedly made the contract had authority to obligate appropriated funds. *Grismac Corp.* v. *United States*, 214 Ct.Cl. 39, 556 F.2d 1096 (1977). By the same line of reasoning, we would deem it possible to make a binding contract subject to Tucker Act jurisdiction, creating a liability for breach of a plea bargaining agreement or one to grant immunity for giving testimony, or to protect a witness. But, in such case, the court would look for specific authority in the AUSA to make an agreement obligating the United States to pay money, and spelling out how in such a case the liability of the United States is to be determined. This is the rationale of our recent witness protection cases, and is the means by which we must determine our jurisdiction of the instant claim. Yet there was no attempt to show the AUSA had such authority.

The need for specificity is the greater because the role of the judiciary in the high function of enforcing and policing the criminal law is assigned to the courts of general jurisdiction and not to this court. It would be reasonable to expect that the court which is to police and, in appropriate cases enforce, agreements for plea bargains, or witness protection, or for immunity, will be the courts in which are or will be pending the criminal prosecutions to which the agreements relate. If this means that money damages for breach are nowhere available, this is the case in any claim area where the Congress has not seen fit to grant its consent to be sued. It is particularly unreasonable to suppose that Congress in enacting the Tucker Act intended for this court

to intervene in the delicate and sensitive business of conducting criminal trials. *Cf. United States* v. *Jones*, 131 U.S. 1 (1889). If, in a case like Mr. Kania's, a future district judge knew his findings on the motion to dismiss would by collateral estoppel create a liability for money damages in this court and out of his control, this might influence his willingness to grant the relief Judge Lasker granted, to the future disadvantage of such as the plaintiff. *Cf. Imbler* v. *Pachtman*, 424 U.S. 409 (1976).

The sovereign's consent to be sued cannot be implied but must be unequivocally expressed. *United States* v. *Testan*, 424 U.S. 392 (1976). The Court did not say this in the context of a claim founded on an alleged contract, but there can be no doubt it there stated the rule of construction which must animate our decisions that deal with sovereign immunity and the consent to suit in every Tucker Act category.

For the above explained reason, it does not matter whether Judge Lasker used the term "contract" or "agreement." Even though the arrangement between plaintiff and defendant was sufficient to warrant dismissing the indictment before the district court, it is not sufficient to give this court jurisdiction or power to award money damages pursuant to that arrangement. Our very specific jurisdictional standards have not been met. The doctrine of collateral estoppel is not applicable.

V

And finally, we address defendant's argument that plaintiff is not entitled to relief because, absent specific legislation to the contrary, the costs of litigation, including attorney's fees, are not recoverable in federal litigation. Defendant is correct. It is well settled that in the absence of specific statutory authority, expenses incurred in litigation, whether legal, accounting, secretarial, or other, are not awardable as such. *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, 265–68 (1975); *Kurz & Root Co.* v. *United States*, Ct.Cl. No. 505–79C (order entered March 3, 1981); *Aparacor, Inc.* v. *United States*, 215 Ct.Cl. 596, 571 F.2d 552 (1978); *J. E. Robertson Co.* v. *United States*, 194 Ct.Cl. 289, 437 F.2d 1360 (1971); *Dittmore-Freimuth Corp.* v. *United States*, 182 Ct.Cl.

507, 390 F.2d 664 (1968); and *Dale Construction Co.* v. *United States*, 161 Ct.Cl. 825, 831 (1963).

Plaintiff Kania asserts that he is not seeking the costs of litigation or attorney's fees, as such, rather he seeks damages arising from the government's breach of contract. Since the attorney's fees and expenses that he was forced to pay were a result of the indictment returned against him in "breach of contract," plaintiff argues that they are properly compensable as contract damages. We have already determined that if there was a compact or agreement between plaintiff and defendant, there was no contract sufficient to satisfy this court's jurisdictional requirements. Should this be in error, we must now add that jurisdiction to award counsel fees and other litigation expenses as an element of breach damages would be extremely dubious. It is the kind of consequential damages not normally awarded in contract breach cases. *William Green Construction Co.* v. *United States*, 201 Ct.Cl. 616, 477 F.2d 930 (1973), *cert. denied*, 417 U.S. 909 (1974). Courts do not, in awarding breach damages, follow through the remote indirect consequences of the breach as distinguished from those directly in contemplation when the contract was made. *Northern Helex Co.* v. *United States*, 207 Ct.Cl. 862, 524 F.2d 707 (1975), *cert. denied*, 429 U.S. 866 (1976). No matter whether characterized as litigation costs or contract damages, plaintiff's counsel fees are not recoverable in this court.

For these reasons, plaintiff's motion for summary judgment is denied and defendant's motion for summary judgment is granted. The petition is dismissed.

☆ U.S. Government Printing Office: 311-087/25

A PORTION OF TITLE 28 UNITED STATES CODE § 1491

§ 1491. Claims against United States generally; actions involving Tennessee Valley Authority

The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort....

A PORTION OF THE MARCH 8, 1978 GRAND JURY TRANSCRIPT OF PETITIONER'S APPEARANCE BEFORE THE GRAND JURY

EUGENE G. KANIA, called as a witness, having been duly sworn by the Foreman of the Grand Jury, testified as follows:

FOREMAN: Will you keep your voice up so the reporters and Jurors may hear.

BY MR. AMOROSA:

Q Would you please state your full name and spell your last name, please.

A Eugene G. Kania [spells].

Q Where do you reside, Mr. Kania?

A In Hillsborough, California.

Q Would you give us your address, please.

A 546 West Anata Inez [spells].

Q Mr. Kania, have you been told by a representative of the Government that you will not be prosecuted in connection

with this matter in return for your good-faith testimony?

A Yes, I have.

. . .

A PORTION OF THE OPINION OF HON. MORRIS E. LASKER, DATED MAY 2, 1979, DISMISSING THE INDICTMENT AGAINST THE PETITIONER

Now, I say it is true that Judge Bauman did set reservations with regard to the limitations of the testimony that might be expected pursuant to the agreement between Mr. Kania and the Government. Nevertheless, I find that the best characterization of the agreement was stated by Mr. Amorosa himself when Mr. Kania appeared before the grand jury. At that time Mr. Amorosa asked Mr. Kania if he had not been told by a representative of the Government that he "will not be prosecuted in connection with this matter in return for good faith testimony."

To me, that agreement, and that is the only record language as to the agreement, is a limited one, which means that Mr. Kania will not be prosecuted if he testifies truthfully to whatever he is

asked to testify. I have not heard that he has not testified truthfully with regard to what he was asked to testify, and I believe that the socalled agreement was limited in that way and that there is no evidence that Mr. Kania has violated that agreement.

Opposition

Office-Supreme Court, U.S.
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CLERK

No. 81-246

In the Supreme Court of the United States

OCTOBER TERM, 1980

EUGENE B. KANIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the Court of Claims erred in dismissing his claim for damages arising out of the government's purported breach of an alleged immunity contract between petitioner and an Assistant United States Attorney.

1. Petitioner is a former officer of the Railway Express Agency, Inc. (REA) (Pet. App. 3a). Beginning in 1974, the Interstate Commerce Commission and the United States Attorney for the Southern District of New York undertook an investigation of REA's business affairs. In connection with the investigation, petitioner was subpoenaed to testify before a grand jury concerning certain REA practices (*ibid.*). In January 1978, petitioner and an Assistant United States Attorney entered into an agreement with regard to petitioner's grand jury testimony. The terms of the agreement, which were never reduced to writing, concerned whether petitioner would be prosecuted for his role in illicit

REA activities (*id.* at 3a-4a).[1] In March 1978, petitioner testified before a grand jury regarding REA matters. Sometime later, the Assistant United States Attorney obtained information implicating petitioner in other questionable REA business practices, and in March 1979 petitioner was indicted in connection with these transactions (*id.* at 4a). After a hearing in the United States District Court for the Southern District of New York, the district court dismissed the indictment on the ground that petitioner had been granted transactional immunity (*ibid.*). The government did not appeal that decision.

Petitioner subsequently brought suit in the United States Court of Claims, seeking damages for breach of an alleged contract not to prosecute him. The court granted the government's motion for summary judgment (Pet. App. 2a-10a), ruling that there was "no contract sufficient to satisfy this court's jurisdictional requirements" under 28 U.S.C. 1491 (Pet. App. 10a). The court also determined that the district court did not find, as petitioner had contended, that there was a contract between petitioner and the government (*id.* at 5a) and further held hat petitioner had failed to show that the Assistant United States Attorney had authority to enter into a contract obligating appropriated funds (*id.* at 7a-8a). The court concluded that petitioner's claim in any event was for legal fees, which are not recoverable against the United States absent specific statutory authority (*id.* at 9a-10a).

2. The decision of the Court of Claims is correct and is consistent with decisions of this Court. Further review is therefore unwarranted.

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[1]The sole memorandum of the agreement is contained in the transcript of petitioner's grand jury testimony, where he responded affirmatively to the question whether he had "been told by a representative of the Government that [he would] not be prosecuted in connection with this matter in return for [his] good faith testimony" (Pet. App. 12a-13a).

Petitioner first contends (Pet. 11-19) that the Court of Claims erred in holding that it lacked jurisdiction to award damages under 28 U.S.C. 1491 (the Tucker Act) on the ground that "the contract entered into between petitioner and respondent is plainly the kind of express contract falling within the jurisdiction of the Court of Claims under the Tucker Act" (Pet. 18). However, as the court below noted, not every agreement the government enters into sounds in contract (Pet. App. 7a). To recover under a contract theory, a claimant must show that the agreement was expressly denominated as a contract (*id.* at 8a; see *United States* v. *Hopkins*, 427 U.S. 123, 129 (1976)) and that "the officer who supposedly made the contract had authority to obligate appropriated funds" (Pet. App. 8a). *Grismac Corp.* v. *United States*, 556 F. 2d 494, 499 (Ct. Cl. 1977).[2] These elements are required because the United States, as sovereign, is immune from suit except as it consents to be sued, *United States* v. *Testan*, 424 U.S. 392, 399 (1976), and such consent cannot be implied but must be unequivocally expressed. *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980). Petitioner has not shown that his understanding with the Assistant United States Attorney was expressly deemed by both parties to be a contract. Indeed, as the court below stated, petitioner's position on this issue seems to have changed over the course of the litigation (Pet. App. 6a).[3] Nor has petitioner shown that the Assistant United

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[2]Cf. 31 U.S.C. 200(a)(1) ("no amount shall be recorded as an obligation of the Government of the United States unless it is supported by documentary evidence of a binding agreement in writing between the parties thereto"); *United States* v. *American Renaissance Lines, Inc.*, 494 F. 2d 1059, 1064 (D.C. Cir.), cert. denied, 419 U.S. 1020 (1974) (31 U.S.C. 200(a)(1) disallows enforcement of oral contracts with the government).

[3]In argument before the district court regarding dismissal of the indictment, petitioner protested the government's efforts "to reduce the issue now before the Court to a matter of contract law" (Pet. App. 6a). Petitioner vigorously asserted that the impact of the agreement could not be decided "on the basis of a simplistic consideration of contract law" (*ibid.*).

States Attorney had the actual authority to enter into such an arrangement.[4]

Petitioner also claims (Pet. 19-23) that the court below erred in denying him litigation costs because such costs are "damages arising from the Government's breach of the contract" (*id.* at 20). However, it is well settled that under the Tucker Act neither the Court of Claims nor a federal district court may grant equitable relief. *Richardson* v. *Morris*, 409 U.S. 464, 465 (1973); *United States* v. *King*, 395 U.S. 1, 3 (1969). Petitioner's reliance on *Vaughan* v. *Atkinson*, 369 U.S. 527, 530 (1962), is therefore unavailing, for that case holds that allowance of counsel fees is "part of the historic equity jurisdiction of the federal courts." Moreover, petitioner is not entitled to the relief sought because, absent specific legislation to the contrary, the costs of federal litigation, including attorney's fees, are not recoverable. 28 U.S.C. 2412; *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, 267-268 (1975). Since there is no specific statutory authorization for recovery of the fees claimed here, petitioner cannot prevail.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

SEPTEMBER 1981

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[4]See 18 U.S.C. 6003. Since petitioner's argument (Pet. 23-28) that the government is collaterally estopped from relitigating the issue of the contract's existence is premised on the erroneous assumption that the district court found such a contract (see Pet. App. 5a, 9a), this argument too must fail.

DOJ-1981-09